Applying these general principles to the case at hand to assess whether the petitioner sufficiently pleaded loss causation, the court below closely examined the allegations contained in the complaint. As it stated, because "[l]oss causation is a fact-based inquiry, . . . the degree of difficulty in pleading it will be affected by [the] circumstances." (Pet. App. 25a.) The court found the allegations in the complaint insufficient:

> To plead loss causation, the complaint[] must allege facts that support an inference that Merrill's misstatements and omissions concealed the circumstances that bear upon the loss suffered such that plaintiffs would have been spared all or an ascertainable portion of that loss absent the fraud. As the district court found, no such allegations are made.

(Pet. App. 26a.)

In particular, because petitioner alleged that the decline in 24/7 Media's stock price occurred concurrently with the downgrade of the recommendation on the stock, the court considered whether petitioner had alleged a causal connection between the subject of the allegedly fraudulent statement and the loss actually suffered, concluding that the downgrade was not a corrective disclosure. (Pet. App. 26a & n.4 (plaintiff's allegation that Merrill's eventual downgrading of 24/7 Media "negatively impacted the price of those securities" did "not amount to a corrective disclosure, however, because [it did] not reveal to the market the falsity of the prior recommendations"); *see also* Pet App. 28a ("The only misrepresentation that can inhere to the 'buy' and 'accumulate' recommendations is that they were not Merrill's true and sincere opinion.").)

The court also explained that petitioner did "not challenge the detailed financial information and investment analysis published alongside Merrill's fraudulent recommendations." (Pet. App. 28a.) Thus, petitioner's complaint was "sharply distinguishable" from earlier cases in which plaintiffs had alleged that the defendants had "'doctored' or hid" a risk that materialized, causing their losses. (Pet. App. 31a; *cf.* Pet. at 13-15 (asserting that his complaints would have survived under *Suez Equity Investors* and *Emergent Capital*).)

Instead, the court below concluded that "substantial indicia of the risk that materialized are unambiguously apparent on the face of the disclosures alleged to conceal the very same risk." (Pet. App. 31a.) Indeed, it was "incontestible that the risk of price volatility – and hence, the risk of implosion – is apparent on the face of every report challenged in the underlying complaints." (Pet. App. 28a-29a.) As petitioner had failed to plead any "facts to establish that the Firm's misstatements . . . concealed the price-volatility risk (or some other risk) that materialized and played some part in diminishing the market value of 24/7 Media," petitioner failed to plead loss causation. (Pet. App. 30a.)

The court below also rejected *sub silentio* petitioner's contentions that he should be permitted to amend to meet what he characterized – erroneously – as "the newly raised standard" for pleading loss causation because his proposed second amended complaint could satisfy the circuit's loss causation pleading standards. (Appellants' Br. at 78-79.)

Petitioner then sought panel rehearing and rehearing *en banc* asserting, as he does here, that the decision below raised the Second Circuit's loss causation pleading standards.

Petitioner did not, however, maintain, as he does here, that it would be a denial of due process for the court to deny him another opportunity to amend his complaint. The petition for rehearing and panel rehearing was denied, with no active judge voting in favor of a rehearing *en banc*. (Pet. App. 128a.)

REASONS FOR DENYING THE PETITION

1. The Decision Below was Correctly Decided and is Consistent with Both This Court's *Dura* Decision and the Purposes of the Private Securities Litigation Reform Act of 1995

Earlier this year, this Court decided *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005), to resolve a split in the circuits on what is required to establish loss causation in a securities fraud claim under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), where, as is the case here, plaintiff invokes the so-called "fraud on the market" presumption of reliance. This Court in *Dura* specifically addressed the question of whether it is sufficient for purposes of pleading loss causation to allege that "'the price *on the date of purchase* was inflated because of the misrepresentation.'" 125 S. Ct. at 1630 (citation omitted; emphasis in original). Recognizing the validity of the view of the Second Circuit, among other circuits, this Court held that "as a matter of pure logic" there cannot be a loss at the time of purchase because the artificial inflation created by the alleged misrepresentation "is offset by ownership of a share that *at that instant* possesses equivalent value." *Id.* at 1631. This Court explained that "a person who 'misrepresents the financial condition of a corporation in order to sell its stock' becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the facts . . .

become generally known' and 'as a result' share value 'depreciate[s].'" *Id.* at 1633 (alteration and ellipsis in original) (quoting the Restatement (Second) of Torts § 548A, cmt. b (1977)). Indeed, this Court further clarified that even after the misrepresentation has been revealed to the market, there may not be a loss attributable to it:

> [The] lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price. . . . Other things being equal, the longer the time between purchase and sale . . . the more likely that other factors caused the loss.

Dura, 125 S. Ct. at 1632.

Rejecting the Ninth Circuit's inflated purchase price approach and siding with the standards applied by the Second, Third and Eleventh Circuits, this Court emphasized that its holding was consistent with an important objective of the federal securities laws – that private rights of action under the anti-fraud provisions of the securities laws be "available, not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura*, 125 S. Ct. at 1633.

> Given the common-law roots of the securities fraud action (and the common-law requirement that a plaintiff show actual damages), it is not surprising that other courts of appeals have

> rejected the Ninth Circuit's "inflated purchase price" approach to proving causation and loss.

Id. at 1632-33 (citing *Emergent Capital*, 343 F.3d at 198; *Semerenko v. Cendant Corp.*, 223 F.3d 165, 185 (3d Cir. 2000); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997); *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir. 1990)). Following the common law, "[t]he [Private Securities Litigation Reform Act of 1995] makes clear Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss." *Dura*, 125 S. Ct. at 1633.

The Second Circuit's decision below, which relied on its prior precedent in *Emergent Capital*, 343 F.3d 189, is entirely consistent with this Court's decision in *Dura* and was correctly decided. The decision below simply articulated and applied general, well-settled legal principles of loss causation that were upheld by this Court in *Dura*, requiring a plaintiff to allege a connection between the subject of the allegedly fraudulent statement and an actual economic loss. (Pet. App. 21a-22a; *see also Dura*, 125 S. Ct. at 1632-33.)

Petitioner's allegations and theories of loss causation have shifted throughout this litigation and have properly been rejected at every turn. In his complaint, petitioner asserted two possible theories of loss causation: first, that respondents' "buy" and "accumulate" ratings caused the securities to trade at artificially inflated prices at the time of purchase, and second, that the trading price of the securities declined when respondents lowered their ratings on the stock. The court below – consistent with the Court in *Dura* – properly and

squarely rejected petitioner's "inflated purchase price" allegations as insufficient to establish loss causation.

> Plaintiffs . . . allege that Merrill's "material misrepresentations and omissions induced a disparity between the transaction price and the true 'investment quality'" of 24/7 Media . . . securities; "that the market price of [the] securities was artificially inflated; and that the securities were acquired "at artificially inflated prices and [the plaintiffs] were damaged thereby." Assuming (as we must) the truth of these allegations, they may establish transaction causation; but they do not provide the necessary causal link between Merrill's fraud and plaintiffs' losses.

(Pet. App. at 27a (alterations in original) (citing *Emergent Capital*, 343 F.3d at 198).) *See also Dura*, 125 S. Ct. at 1631 ("as a matter of pure logic" there cannot be a loss at the time of purchase).[4]

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4. In the court of appeals, petitioner amplified this theory of loss causation he alleged in the complaint by asserting that "Defendants' fraud resulted in artificially inflated stock prices, and . . . the market correction of these inflated prices led Plaintiffs to suffer damages." (Appellants' Br. at 47.) This theory, however, did not differ in any meaningful way from the earlier one ultimately rejected by this Court in *Dura*, *see* 125 S. Ct. at 1629, adding only an allegation that the inflation was no longer incorporated into the price of the securities by the end of the putative class period because, somehow, it was eliminated "through the normal operation of the forces of supply and demand." (Pet. at 21.) This empty allegation – which fails to connect any misrepresentation with an identified economic loss – is in fact one of the vestiges of the now overruled Ninth Circuit pleading standard. *See Wool v. Tandem Computers*,

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With respect to the second alleged theory contained in the complaint, the court below concluded that the alleged loss could not have been caused by respondents' downgrading of the stock ratings because the downgrading, by itself, "do[es] not reveal to the market the falsity of prior recommendations." (Pet. App. 26a n.4.) In fact, petitioner never alleged that the market learned of the alleged falsity of the investment opinions during the putative class period ending in November 2000. The court below observed that, "[t]o the contrary, plaintiffs have argued affirmatively on this appeal that the falsity of Merrill's recommendations was made public no earlier than April 2002. . . . The complaints withstand the statute of limitations on the strength of that argument." (*Id.*) Accordingly, the court explained that the complaint could not plead a causal connection between the alleged misrepresentation and the asserted loss: "Merrill's concealed opinions regarding 24/7 Media . . . could not have caused a decrease in the value of [the stock] before the concealment was made public." (*Id.*)

In his Petition to this Court, petitioner again shifts legal theories. No longer fettered by the district court's statute of limitations dismissal in light of the decision below on this point, petitioner now asserts before this Court – contrary to

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Inc., 818 F.2d 1433, 1437 (9th Cir. 1987) (hypothesizing that "the increment of artificial inflation caused by misrepresentations may fluctuate 'as a result of market forces operating on the misrepresentations'" and therefore, so-called "in and out" traders may recover in an action for securities fraud) (*cited in* Appellants' Br. at 57). Petitioner expressly relied upon *Wool* below, and now, in light of *Dura*'s overruling of the Ninth Circuit's loss causation jurisprudence, relies on equally dubious, pre-*Dura* rulings of district courts for his same theory of loss causation.

his complaint – that, indeed, the market did learn of the alleged falsity of the ratings at some indeterminate time during the putative class period. (*See* Pet. at 3 ("the market gradually realized").) He thus now maintains that his economic loss was occasioned by the decline in share price caused when the alleged falsity of Merrill Lynch's opinions was revealed to the market at unspecified and indeterminate times. (*See* Pet. at 21.) But below, petitioner repeatedly argued – successfully to the Second Circuit in order to prevail on the statute of limitations argument – that the falsity of the opinions was not revealed until the NYAG made his allegations public on April 8, 2002, long after the end of the putative class period. (*See* Pet. App. 26a n.4; *see also* Appellants' Br. at 25, 30, 34; Appellants' Reply Br. at 3.) Not only does petitioner's new theory fail under *Dura* because it does not plead a connection between a misrepresentation and an actual economic loss, but the Court need not decide issues that were not presented or decided below. *See, e.g.*, *Davis v. United States*, 495 U.S. 472, 489 (1990).

The Second Circuit correctly held that, on the facts alleged, petitioner failed to plead either a connection between any of the more than 40 allegedly false "buy" or "accumulate" ratings and the decline in the trading price of 24/7 Media securities, or that the research reports concealed any risk that materialized and thereby caused petitioner's losses. (Pet. App. 26a & n.4.)

> The only misrepresentation that can inhere to the "buy" and "accumulate" recommendations is that they were not Merrill's true and sincere opinion. Yet plaintiffs allege no loss resulting from the market's realization that the opinions were false, or that Merrill concealed any risk that could

> plausibly (let alone foreseeably) have caused plaintiffs' loss.

(Pet. App. 28a.) This fact-specific application of general principles of loss causation and proximate cause to the complaint at issue in this case does not merit review by this Court.

2. There is No Conflict Among the Circuits on the Question Presented

The decision below is consistent with fundamental principles of loss causation articulated in longstanding Second Circuit precedent, as well in the Third, Seventh and Eleventh Circuits, all of which were upheld by this Court in *Dura*. *See Dura*, 125 S. Ct. at 1632-33 (citing *Emergent Capital*, 343 F.3d at 198; *Semerenko*, 223 F.3d at 185; *Robbins*, 116 F.3d at 1448; *Bastian*, 892 F.2d at 685); *see also* Pet. App. 27a (citing *Emergent Capital*, 343 F.3d at 198). None of the court of appeals decisions which petitioner asserts have articulated "different standards" for pleading loss causation in securities fraud cases (Pet. at 12-20) has held, as petitioner asserts, that a plaintiff's alleged economic loss could be held to have been proximately caused by a misstatement or omission before the subject matter of the misstatement or omission was disclosed to the public. To the contrary, the plaintiffs in the circuit court cases relied upon by petitioner cited "explicit disclosures" in support of their loss causation allegations – precisely what petitioner asserts he is *not* required to plead in order to sufficiently allege loss causation.

More fundamentally, petitioner does not – and cannot – set forth a crisp statement of the nature of the alleged circuit

conflict. In fact, none of the circuit decisions cited by petitioner even addressed petitioner's current or former theory of loss causation. (*See* Pet. at 13-20.) Nor were any of these decisions of other circuits decided after *Dura*. Therefore, there is no reason for the Court to revisit the issue of loss causation pleading at this point absent further percolation of the issue in the courts of appeals.

Petitioner premises the asserted conflict on an incorrect statement of the decision below which he couples with his mere speculation that his complaint would have survived a motion to dismiss under other circuits' pleading standards *because it is not necessarily "foreclose[d]"* by those decisions or by this Court's decision in *Dura*, 125 S. Ct. 1627. (Pet. at 21; *see also id.* at 19-20.) All of the other circuit court decisions and *Dura* are consistent, however, with the holding below that a plaintiff may plead loss causation by alleging "'that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered,' *i.e.*, that the misstatement or omission concealed something from the market that, when disclosed negatively affected the value of the security." (Pet. App. 21a-22a (quoting *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001)).)

> To plead loss causation, the complaints must allege facts that support an inference that Merrill's misstatements and omissions concealed the circumstances that bear upon the loss suffered such that plaintiffs would have been spared all or an ascertainable portion of that loss absent the fraud. As the district court found, no such allegations are made. There is no allegation that the market reacted negatively to a corrective

> disclosure regarding the falsity of Merrill's "buy" and "accumulate" recommendations and no allegation that Merrill misstated or omitted risks that did lead to the loss. This is fatal under Second Circuit precedent.

(Pet. App. 26a (citation omitted).)

The court below articulated a general standard in explaining why petitioner's complaint was fatally defective:

> The only misrepresentation that can inhere to the "buy" and "accumulate" recommendations is that they were not Merrill's true and sincere opinion. Yet plaintiffs allege no loss resulting from the market's realization that the opinions were false, or that Merrill concealed any risk that could plausibly (let alone foreseeably) have caused plaintiffs' loss.

(Pet. App. 28a.) That standard is consistent with *Dura* and the other circuit court decisions.

In fact, in each of the other circuit court cases, plaintiffs had asserted that their losses occurred following public announcements that allegedly revealed the subject of the nondisclosures; the courts then examined whether it was the revelation of the alleged misrepresentation or omission that was the actual cause of the decline in the stock price. *See Semerenko v. Cendant Corp.*, 223 F.3d 165, 169-71, 183-87 (3d Cir. 2000) (decline in share price following public announcements of accounting irregularities and termination of merger agreement); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1445-49 (11th Cir. 1997) (complaint dismissed

where, although the share price declined following a dividend announcement, the announcement did not reveal the alleged misrepresentation).[5]

Petitioner also asserts, albeit indirectly, that the Second Circuit held that petitioner was "precluded" from pleading that his alleged losses were caused by Merrill Lynch's research recommendations because the "intervening decline in Internet stock prices" broke the chain of causation. (*See* Pet. at 19, 20.) This supposed conflict is also predicated on a misstatement of the holding below and likewise finds no support in any of the circuit decisions upon which petitioner relies. The decision below concluded that the "risk of price volatility and hence the risk of implosion" – the risk that materialized – was "incontestibl[y]" disclosed. Applying ten-year-old precedent, the court below held that in the face of the bursting of the technology bubble (of which the court took judicial notice), petitioner was required, but failed, to allege facts sufficient to support the inference that the asserted losses were caused by the misstatements and omissions alleged in the complaint and not the general decline in the market. (Pet. App. 28a-31a; *see also Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189-90 (2d Cir. 1995) (affirming dismissal in light of failure to sufficiently allege loss causation due to "presence of a . . . direct intervening cause" of loss); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771-72 (2d Cir. 1994) (affirming dismissal where plaintiffs failed to allege a factual basis to support

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5. Petitioner does not actually rely upon any decision by the court of appeals for the Seventh Circuit as the basis for his asserted conflict. Instead, he relies on a six-year old "recent" district court opinion that he describes as "the Seventh Circuit standard." (Pet. at 17-18.)

their causation claim following the collapse of the real estate market).) The court observed:

> "[W]hen the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases," and a plaintiff's claim fails when "it has not adequately ple[ ]d facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events."

(Pet. App. 25a (second alteration in original) (quoting *First Nationwide Bank*, 27 F.3d at 772).) Indeed, as this Court recognized in *Dura*, even after a misrepresentation is revealed to the market:

> [A] lower [trading] price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price. . . . Other things being equal, the longer the time between the purchase and sale, the more likely that is so, *i.e.*, the more likely that other factors caused the loss.

Dura, 125 S. Ct. at 1632.[6]

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6. The Eleventh Circuit in *Robbins* noted in passing – in a case which did not involve the collapse of a market – that a plaintiff need not show that the defendant's misrepresentation was responsible for

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The Second Circuit's conclusion here is not in conflict with the pre-*Dura* circuit decisions cited by petitioner, let alone any post-*Dura* decisions. The Petition should be denied because petitioner's reliance on a pre-*Dura* alleged circuit conflict (which does not exist) or on a purported conflict between district court decisions does not raise an issue worthy of this Court's review.

3. The Due Process Clause of the Fifth Amendment Is Not Implicated by the Second Circuit's Affirmance of a Refusal to Permit Petitioner to Amend a Second Time

There are no constitutional implications that flow from the Second Circuit's affirmance of a grant of a motion to dismiss without leave to amend. Any other conclusion would open the floodgates to constitutional due process challenges any time a court of appeals affirms a dismissal with prejudice. Petitioner's contention that his due process rights were violated because he was not given leave to amend fails both because federal constitutional due process principles do not protect rights that are discretionary and because the decision below did not establish a new, higher pleading standard, as petitioner maintains.

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the *entire* decline. *See Robbins*, 116 F.3d at 1447 n.5. The Third Circuit in *Semerenko* ruled that an intervening tender offer, which drove the allegedly inflated share price to rise to the bid price was not "sufficient to break the chain of causation." *Semerenko*, 223 F.3d at 186-87. The Second Circuit's holding that a plaintiff must allege sufficient facts to support an inference that his losses – or some portion of them – resulted from an alleged nondisclosure rather than from the market collapse thus does not conflict with either *Robbins* or *Semerenko*. (*See* Pet. App. 31a.)

The Due Process Clause of the Fifth Amendment does not protect discretionary entitlements. *See Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2803 (2005) ("Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion."); *see also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972). It is "[o]nly after finding the deprivation of a protected interest [that the Court looks] to see if the State's procedures comport with due process." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Whether a court will permit further amendment of a pleading following a previous amendment is a matter of discretion. *See, e.g., Conboy v. AT&T Corp.*, 241 F.3d 242, 259 (2d Cir. 2001); *see also* Fed. R. Civ. P. 15(a). Therefore, petitioner's right to amend his complaint is not a right protected by the Due Process Clause, and any inquiry into the procedures used to deny further amendment is unnecessary.

Furthermore, the predicate of petitioner's supposed due process claim (Pet. at 25-26) – that the Second Circuit raised the pleading standards without affording him an opportunity to amend – is wrong. The decision below does *not* hold that any and all securities fraud plaintiffs "must allege 'facts sufficient to support an inference that it was defendant's fraud – rather than other salient facts – that proximately caused plaintiff's loss or . . . to apportion the losses between the disclosed and concealed portions of the risk that ultimately destroyed the investment.'" (Pet. at 26 (ellipsis in original) (quoting Pet. App. 31a).) Petitioner has omitted a critical limitation from his statement of the holding below: *immediately preceding* the language quoted by petitioner, the Second Circuit *limited* its holding to situations "where (as here) substantial indicia of the risk that materialized are

unambiguously apparent on the face of the disclosures alleged to conceal the very same risk." (Pet App. 31a (emphasis added).)

This qualified holding was plainly dictated by petitioner's own factual allegations. The court of appeals explained that petitioner's failure to allege that respondents "doctored" or concealed information relating to material risks associated with an investment in 24/7 Media made petitioner's case "sharply distinguishable from cases in which some or all of the risk that materialized was clearly concealed by a defendant's misstatements or omissions." (Pet. App. 31a (citing *Suez Equity*, 250 F.3d at 97-98 and *Emergent Capital*, 343 F.3d at 196-98); *cf.* Pet. 14-15 (asserting that his proposed amended complaint would have been sustained under *Suez Equity* and *Emergent Capital*).)

In addition to petitioner's misstatement of the ruling below, no judge on the panel below dissented from the opinion on the ground that a legal standard had been altered or raised without notice, as occurred in the cases upon which petitioner relies.[7] Nor did any active judge vote in favor of

7. *See* Pet. at 25-26 (citing *Sun-Land Nurseries, Inc. v. So. Cal. Dist. Council of Laborers*, 793 F.2d 1110, 1121 (9th Cir. 1986) (*en banc*) (Wiggins, J., dissenting) ("granting a dismissal on the pleadings without leave to amend based on a new legal standard. . . ."); *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 714 (2d Cir. 1998) (Newman, J., dissenting) (asserting that the court applied a new standard to plaintiff's employment discrimination claim); and *Hatch v. Federal Energy Regulatory Comm'n*, 654 F.2d 825, 834-37 (D.C. Cir. 1981) (alteration of the standard of proof imposed by the government in an adjudicatory administrative proceeding in which one commissioner dissented on grounds that the commission had changed the standard of proof)). None of these cases holds that it was a denial of due process not to provide the party with notice of the legal standard to be applied in each of the proceedings.

rehearing *en banc*. (Pet. App. 128a.) Instead, in rendering its unanimous decision below, the court discussed at length and expressly relied upon the circuit's prior precedents (Pet. App. 20a-25a), explaining that "[t]his Court's cases – post-*Suez* and pre-*Suez* – require both that the loss be foreseeable and that the loss by caused by the materialization of the concealed risk." (Pet. App. 22a (citations omitted).) "We follow the holdings of *Emergent Capital*, [343 F.3d 189], *Castellano* [*v. Young & Rubicam, Inc.*, 257 F.3d 171 (2d Cir. 2001)], and *Suez Equity*, [250 F.3d 87]." (Pet. App. 24a.)

Furthermore, petitioner plainly *was* on notice of the requirement that he plead that respondents concealed a risk that materialized and, thereby, caused his losses, but he apparently was unable to do so. As the court below noted:

> [Petitioner] alleged that plaintiffs were injured "because the risks that materialized were risks of which they were unaware as a result of Defendants' scheme to defraud," and that they would not have been injured absent the scheme. But that is a legal conclusion; missing are the necessary allegations of fact to support the conclusion.

(Pet. App. 28a.)

Petitioner asks the Court to fashion a rule that is without guideposts, is unworkable in practice and, therefore, lacks any broad applicability. Any losing party who disagreed with the way the law was applied on the facts of his case might assert that his due process rights were violated because the court did not permit him to amend his complaint to meet the "new" standard. Such a rule is unsupported.

The Second Circuit's conclusion here is not in conflict with the pre-*Dura* circuit decisions cited by petitioner, let alone any post-*Dura* decisions. The Petition should be denied because petitioner's reliance on a pre-*Dura* alleged circuit conflict (which does not exist) or on a purported conflict between district court decisions does not raise an issue worthy of this Court's review.

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rehearing *en banc*. (Pet. App. 128a.) Instead, in rendering its unanimous decision below, the court discussed at length and expressly relied upon the circuit's prior precedents (Pet. App. 20a-25a), explaining that "[t]his Court's cases – post-*Suez* and pre-*Suez* – require both that the loss be foreseeable and that the loss by caused by the materialization of the concealed risk." (Pet. App. 22a (citations omitted).) "We follow the holdings of *Emergent Capital*, [343 F.3d 189], *Castellano* [*v. Young & Rubicam, Inc.*, 257 F.3d 171 (2d Cir. 2001)], and *Suez Equity*, [250 F.3d 87]." (Pet. App. 24a.)

Furthermore, petitioner plainly *was* on notice of the requirement that he plead that respondents concealed a risk that materialized and, thereby, caused his losses, but he apparently was unable to do so. As the court below noted:

> [Petitioner] alleged that plaintiffs were injured "because the risks that materialized were risks of which they were unaware as a result of Defendants' scheme to defraud," and that they would not have been injured absent the scheme. But that is a legal conclusion; missing are the necessary allegations of fact to support the conclusion.

(Pet. App. 28a.)

Petitioner asks the Court to fashion a rule that is without guideposts, is unworkable in practice and, therefore, lacks any broad applicability. Any losing party who disagreed with the way the law was applied on the facts of his case might assert that his due process rights were violated because the court did not permit him to amend his complaint to meet the "new" standard. Such a rule is unsupported.